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No. 00-1255

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Supreme Court, U.S.
FILED
MAR 13 2001
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CHAMBER OF COMMERCE OF THE UNITED STATES,
Petitioner,

VERSUS

FRANK VOLLOR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

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MOTION FOR LEAVE TO FILE, OUT OF TIME, AND BRIEF OF THE STATE OF MISSISSIPPI, *AMICUS CURIAE*, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE, OUT OF TIME, THE BRIEF OF THE STATE OF MISSISSIPPI, *AMICUS CURIAE*, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The State of Mississippi respectfully moves for leave to file out of time the annexed brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari. The Chamber of Commerce of the United States of America's ("Chamber's") failure to serve its petition on the Attorney General has prejudiced the State's ability to file an opposition within the time prescribed by to S. Ct. R. 15(3). The Attorney General was never served with the petition, and only on February 19, 2001, obtained a copy of the petition from a third party. The State respectfully requests leave to file its opposition as of today's date -- less than thirty days after the Attorney General received a copy of the petition.[1]

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[1]Upon reviewing the petition, the State quickly submitted a letter to this Court and to the parties stating that the inclusion of the *Moore* decision in the *Vollor* petition was improper and notifying all parties that the Attorney General had

The State is not a party to the case of *Chamber of Commerce of the United States v. Vollor* in which petitioner seeks a writ of certiorari to the Mississippi Supreme Court. *See* Pet. at (i), 1, 12-15. However, the omnibus petition improperly seeks review of a separate federal district court decision, *Chamber of Commerce of the United States v. Moore*, regarding the constitutionality of Mississippi election disclosure statutes as applied. *See* Pet. at (i), 1, 15-21. The *Moore* case, to which the State is a party, is presently pending before the United States Court of Appeals for the Fifth Circuit.

The Chamber's failure to serve the Attorney General with its petition was in contravention of the rules of this Court. Although the petition clearly requests this Court to review the findings of the federal district court in *Moore* regarding the constitutionality of Mississippi campaign disclosure statutes as

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not received formal service of the petition. Upon further review of the petition, the State now seeks leave to file its brief in opposition to the petition.

applied to the Chamber's advertisements. *see* Pet. at 15-21. the Chamber failed to serve a copy of the petition on the Attorney General as required by the rules of this Court. *See* S. Ct. R. 29(c). Moreover, having raised the issue of the constitutionality of Mississippi statutes as applied, the Chamber was required, but failed, to notify this Court that a state's statutory right of intervention (28 U.S.C. § 2403(b)) may be applicable. *See* S. Ct. R. 29(c).

Finally, independent of Rule 29 the petitioner knew that the State of Mississippi is a party to *Moore* as both the petitioner and the State are before the court of appeals in that very matter. Having sought review of the holding of the federal district court in *Moore* in the petition, the Chamber was required, but failed, to notify the State as an interested party pursuant to S. Ct. R. 29(3) (requiring notice to each party to the proceeding of which review is sought).

Because of the State's lack of notice of the petition brought about by petitioner's failure to provide service upon the Attorney General, the State respectfully requests leave to file its *amicus curiae* brief in opposition as of today's date -- less than thirty days after the Attorney General received a copy of the petition from a third party.

March, 2001.

Respectfully submitted,

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INTRODUCTION

The State of Mississippi, through its Attorney General, respectfully submits its brief *amicus curiae* pursuant to S. Ct. R. 37 in opposition to the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America's ("Chamber's") petition for a writ of certiorari seeks review of two separate and distinct lower court opinions, each represented by a separate "question presented." The first question presented seeks review of the propriety of temporary injunctions issued by Mississippi state courts at the behest of judicial candidates. Such issues of prior restraint are present in the matter of *Chamber of Commerce of the United States v. Vollor*. Neither the State of Mississippi, nor its Attorney General or Secretary of State, are parties to the *Vollor* case.

The petition's second question presented seeks review of the decision of the United States District Court for the

Southern District of Mississippi in *Chamber of Commerce of the United States v. Moore, et al.*, (S.D. Miss. No. 3:00-cv-778ws) upholding the constitutionality of the State's election disclosure statutes as applied to the Chamber's judicial candidate advertisements. The State of Mississippi is a party to the *Moore* case which is pending, via a notice of appeal filed by the Chamber, with Court of Appeals for the Fifth Circuit (COA No. 00-60779).[1]

The State of Mississippi has a direct interest in the *Moore* matter as the State, through its Attorney General and Secretary of State, is a party to that case and the *Moore* decision upholds the constitutionality of state statutes as applied. Because the petition seeks to impermissibly combine the *Vollor* and *Moore* decisions and seeks the extraordinary review of the *Moore* decision before a judgment has been entered by the Fifth Circuit, the State submits its opposition to the petition as it pertains to *Moore*.

SUMMARY OF ARGUMENT

The Chamber's omnibus petition for a writ of certiorari impermissibly seeks review of two separate and distinct decisions issued by separate courts, regarding different issues, and which are in different stages of appellate review. *See* Pet. at (i), 1. Under the guise of seeking review of a state court decision regarding temporary injunctions (the *Vollor* case), the petition's overly expansive reach seeks review of a separate federal court decision regarding the constitutionality of Mississippi's election-disclosure statutes as applied to the Chamber's judicial candidate advertisements (the *Moore* case).

As a petition for a writ of certiorari may not seek review of judgments issued by different courts, the petition should be denied as it pertains to the federal court decision in *Moore*.

Additionally, the *Moore* decision is currently pending before the Court of Appeals for the Fifth Circuit and the Chamber's initial brief has already been submitted to that court.

Chamber's initial brief has already been submitted to that court. Pursuant to Supreme Court Rule 11, certiorari should be denied as to *Moore* as there is no extraordinary circumstance which justifies a deviation from traditional appellate procedures to forego review by the court of appeals and require immediate review by this Court.

ARGUMENT

THE PETITION SHOULD NOT BE GRANTED AS IT PERTAINS TO THE *MOORE* CASE AS *MOORE* IS A SEPARATE JUDGMENT AND NO JUSTIFICATION EXISTS FOR REMOVING *MOORE* FROM THE COURT OF APPEALS BEFORE A JUDGMENT IS ENTERED BY THAT COURT.

The Chamber's omnibus petition for a writ of certiorari impermissibly seeks review of two separate lower court judgments--*Chamber of Commerce of the United States v. Vollor*, (Mississippi Supreme Court No. 2000-M-01830), and *Chamber of Commerce of the United States v. Moore*, (S.D. Miss. No. 3:00-cv-778ws). As set forth in the first question presented, the petition seeks review of temporary injunctions issued by state courts at the behest of judicial candidates in *Vollor*.[1] *See* Pet. at (i), 1, 12-15. The *Vollor* court did not review the First Amendment issues raised in the second

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[1]The Mississippi Supreme Court denied an application by the Chamber to stay the injunction. *See* Pet. at 9. It is that decision by the State Supreme Court for which the Chamber seeks review. *See* Pet. at 2-3.

question presented, but instead relied on the *Moore* decision addressed below. *See* Pet. at 5-11. The State is not a party to *Vollor* and neither the Attorney General nor the Secretary of State played any role in that private litigation.

The second question presented seeks review of the constitutionality of the state's election disclosure statutes as applied to the Chamber's judicial candidate advertisements in light of *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent interpretative decision. *See* Pet. at (i), 15-21. However, as the petition concedes, the constitutionality of the election disclosure statutes was not addressed or decided in *Vollor* but was, in fact, decided only in the federal district court case of *Moore*. *See* Pet. at 5-11. The federal court decision in *Moore* is limited in its scope to the constitutionality of state statutes as applied to particular candidate ads and did not address or authorize any aspect of the temporary injunctions issued by the state courts in *Vollor*.

The *Moore* case is pending before the United States Court of Appeals for the Fifth Circuit and the Chamber has already submitted its initial brief to that court. *See* Pet. at 7 n.4.

Because the *Vollor* and *Moore* decisions are different judgments by separate courts, regarding different issues and in different stages of appellate review, the Chamber's attempt to include a review of the *Moore* decision in its petition for review of *Vollor* is impermissible. Additionally, even if such inclusion was proper, *Moore* is pending before the Fifth Circuit and no extraordinary circumstance exists to justify by-passing the court of appeals for immediate review by this Court. *See* S. Ct. R. 11.

A. Certiorari Should Be Denied As To *Moore* As The Petition Must Be Limited To The Review Of A Judgment Of One Court.

As is evident in the petition, the *Moore* and *Vollor* judgments were issued by different courts and decided separate and distinct legal issues. Inclusion of the *Moore* case in the *Vollor* petition is improper as judgments by separate courts

must be advanced in separate petitions no matter how identical or related the questions involved. *See* S. Ct. R. 12(4) (allowing only similar judgments from same court to be combined); *see also* Robert L. Stern et al., *Supreme Court Practice*, 328 (7th ed. 1993) ("Judgments entered by separate courts are considered to be different cases for purposes of Supreme Court review.")

The *Moore* decision referenced in the second question presented, upheld the constitutionality of the state's election reporting statutes as applied to judicial election ads in a declaratory judgement action filed by the Chamber. *See* Pet. at 5. The Chamber filed the action in federal court seeking an order that the Chamber's judicial candidate commercials were "issue ads" and that any construction of the statutory election reporting requirements which required disclosure by the Chamber would be unconstitutional.[2] *See* Pet. App. at 10a. The

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[2]Mississippi Code requires entities making "independent expenditures" in excess of $200.00 to attest that such expenditures were not coordinated with a candidate and disclose

State argued, and the federal district court found, that the statutes were constitutional as applied to the Chamber's judicial candidate commercials as such commercials were "candidate ads" containing "explicit directives to vote for the named candidate" and were, therefore, subject to the statutory disclosure requirements. *See* Pet. App. at 34a.

In contrast, the *Vollor* court addressed the appropriateness of temporary injunctions and did not review the constitutionality of state election disclosure statutes. The *Vollor* court merely cited the *Moore* decision for the proposition that the ads were subject to campaign reporting requirements. *See* Pet. at 5, 11.

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the persons financing such expenditures. Miss Code Ann. § 23-15-801(j) defines "independent expenditures" as expenditures "expressly advocating the election or defeat of a clearly identified candidate...." This standard was adapted from federal election statutes and this Court's jurisprudence regarding the same.

The petition's lengthy arguments concerning "express advocacy" and the application of the *Buckley* decision are unrelated to the issues decided in *Vollor* and instead directed as a challenge to the findings of the federal district court in *Moore*. *See* Pet. at 15-21. The Chamber's attempt to seek review of the *Moore* decision through drafting an overly expansive petition in the *Vollor* matter is improper. *See* S. Ct. R. 12(4); Stern, *supra*, at 328. The petition should be denied to the extent it seeks review of the *Moore* decision pending before the Fifth Circuit Court of Appeals.

B. Certiorari Should Be Denied As To *Moore* As *Moore* Is Pending Before The Court Of Appeals For The Fifth Circuit.

Even should the *Moore* case be deemed to be properly included in the *Vollor* petition, *Moore* is pending before the Fifth Circuit and no exceptional necessity exists sufficient to justify by-passing the court of appeals in favor of immediate review by this Court. *See* S. Ct. R. 11.

Certiorari to a United States court of appeals before a judgment is entered by that court is, with good reason, "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.); *see also* Stern, *supra*, at 42, 199-200. While such a review is permissible under extraordinary circumstances, the petition fails to recognize or address the criterion for such review set forth in S. Ct. R. 11. As there is no "imperative public importance" sufficient to warrant "immediate" action by the Supreme Court and the accompanying "deviation from normal appellate practice," review by this Court of the *Moore* decision is unwarranted at this still preliminary appellate stage. *See* S. Ct. R. 11; *see also* Stern, *supra*, at 199 ("The public interest in a speedy determination must be exceptional, however, to warrant skipping the court of appeals in this fashion.")

The State believes that the unique factual and substantive legal issues set forth in the *Moore* decision will benefit from the

reflective study of the Fifth Circuit Court of Appeals and that such an important appellate step should not be foregone on the basis of the arguments now improperly raised in the petition.[3] The federal district court in *Moore* undertook a detailed examination of First Amendment jurisprudence, including analysis of the decisions of this Court in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and the application of such decisions by federal and state courts. *See generally* Pet. App. at 9a. The Fifth Circuit Court of Appeals has never addressed the issues presented by

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[3]Review by the court of appeals will sharpen the issues and correct misstatements contained in the petition. For instance, the petition states that the district court found that the Chamber's candidate advertisements contained "no words of 'express advocacy.'" *See* Pet. at 15. However, the district court found that the "advertisements at issue provide explicit directives to vote for the named candidate" as the advertisements mirrored the advertisements run by the candidates themselves. *See* Pet. App. at 34a. The only material difference between the Chamber's ads and the candidates' ads (all of which repeated the candidates' names in connection with campaign slogans) was that the Chamber deleted the words "vote for" in its version of the ads. *See* Pet. App. at 14a-18a.

Moore and experience argues that the Fifth Circuit will clarify and refine the issues to be presented to this Court.

In addition to the benefits to be gained by following traditional appellate procedures, the *Moore* case does not present the need for extremely rapid review sufficient to warrant foregoing the court of appeals. As opposed to the *Vollor* state court case regarding temporary injunctions issued but stayed before elections, the *Moore* case addressed reporting requirements which can be reviewed through normal appellate procedures. The Chamber cannot be heard to argue that it fears immanent and irreparable harm from *Moore* as the Chamber did not ask the Fifth Circuit for a stay of the *Moore* decision pending appeal and the Chamber even requested an extension of the briefing schedule before the court of appeals. If the *Moore* case is truly in need of exceptionally quick review, this Court has previously intrusted appellate courts to act upon cases

with sufficient diligence as to allow for meaningful subsequent review. *See Aaron v. Cooper*, 357 U.S. 566, 567 (1958).

Finally, and a point conceded by the organization of the petition itself, because the issues presented in the *Vollor* and *Moore* decisions are separate and distinct, should this Court feel compelled to take swift and potentially summary action with respect to the now stayed and ineffectual *Vollor* temporary injunctions, the State respectfully submits that the cases and issues should be severed and *Moore* should remain with the Fifth Circuit. *Cf.* Pet. at 12-15 (discussing *Vollor*) *and* Pet. at 15-21 (discussing *Moore*). The *Vollor* state court injunction issues are not present in the *Moore* decision and a review of the propriety of such prior restraints does not require review of the "express advocacy" doctrine and the application of *Buckley* to state election law statutes. There exists no exceptional need sufficient to prematurely wrest the *Moore* case from the Fifth Circuit.

CONCLUSION

The State respectfully requests that the portion of the Chamber's petition for a writ of certiorari which seeks review of the *Moore* decision, specifically the second question presented, should be denied.

March, 2001.

Respectfully submitted,

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